91-303

No. 91-

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

Oscar W. JACKSON, Clayborne Taite, Jr., George Bru, Albert Walton, as Union Trustees of MSSA-ILA Pension Plan and Trust,
Petitioners,

— v —

Harry SMITH, Defendant,

Arthur W. Stratton, Hartwell Ludlow, Ned Mattingly, as Employer Trustees of MSSA-ILA Pension Plan and Trust,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS

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Questions Presented

1. Did the Court of Appeals for the Eleventh Circuit err and render a decision in conflict with other Circuits when it concluded that Section 302(c)(5)(B) of the Labor Management Relations Act, (''LMRA''), 29 U.S.C.A. 186(c)(5)(B), did not require arbitration of a request to increase pension benefits under the subject plan, even though the trustees were deadlocked over the issue, on the basis that a requested increase in pension benefits was not a matter of trust administration because the trust document requires an amendment to change benefits and the approval of seventy-five percent (75%) of all trustees is required for amendments?

2. Does a provision in the subject plan requiring a seventy-five percent (75%) affirmative vote of the trustees in order to amend it violate LMRA, Section 302(c)(5)(B), 29 U.S.C.A. 186(c)(5)(B)?

Parties

The full listing of the parties in this case taken from the caption of the pleading is as follows:

A. Petitioners:

Oscar W. Jackson[1], Clayborne Taite, Jr.[1], George Bru[1], and Albert Walton, Jr., as Union Trustees of the MSSA-ILA Pension Plan and Trust[2].

B. Respondents:

Harry Smith[3], Arthur W. Stratton, Hartwell Ludlow and Ned Mattingly, as Employer Trustees of the MSSA-ILA Pension Plan and Trust[4].

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[1]Neither Mr. Jackson, Mr. Taite nor Mr. Bru were plaintiffs in the original action filed in the district court but were substituted as plaintiffs when they replaced original plaintiffs Seymour Irby, Henry Clarke and Anthony Costell, as trustees to the MSSA-ILA Pension Plan and Trust.

[2]Oscar W. Jackson and Clayborne Taite, Jr. are affiliated with International Longshoremen's Association, Local 1410, George Bru is affiliated with International Longshoremen's Association, Local 1459 and Albert Walton, Jr. is affiliated with International Longshoremen's Association, Local 1410-1.

[3]Harry Smith resigned as an Employer Trustee subsequent to the filing of the appeal to the Eleventh Circuit and is no longer a party to this action nor is he affiliated in any way with any of the parties.

[4]Arthur W. Stratton is affiliated with Ryan Walsh, Inc., Hartwell Ludlow is affiliated with Page and Jones, Inc., and Ned Mattingly is affiliated with Strachan Shipping Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Introduction

This case presents a conflict between the United States Court of Appeals for the Eleventh Circuit and the Second, Fifth and Eighth Circuits concerning the proper application of Section 302(c)(5)(B) of the Labor Management Relations Act ("LMRA"), 29 U.S.C.A. 186(c)(5)(B), to a proposed increase in pension benefits under an ERISA Pension Plan where the Union Trustees and Employer Trustees are deadlocked. The

Eleventh Circuit held that the proposed increase was not subject to the arbitration requirements of 29 U.S.C.A. 186(c)(5)(B) because it was not a matter of trust administration under the plan. Three other circuits have all held just the opposite in similar factual situations.

The Eleventh Circuit's ruling unduly and improperly restricts the plain meaning of the statute and the petitioners submit the following reasons for allowance of the Writ of Certiorari so that the error may be corrected and the conflict between the circuits resolved.

Opinions Below

The opinion of the court of appeals, styled *Jackson, et al., v. Smith, et al.*, which is reported at 927 F.2d 544 (11th Cir. 1991) is reproduced as Appendix A (App. A at 1a-10a). The judgment and order of the district court, styled *Irby et al., v. Smith et al.*, DKT No. 89-0438-T, was filed and entered on June 8, 1990 as Judgment Entry No. 274, in the records of the clerk for the United States District Court for the Southern District of Alabama, Southern Division and is reproduced as Appendix B (App. B at 11a-16a). The court of appeals order of May 20, 1991 denying petitioners' Petition for Rehearing and Suggestion for Rehearing In Banc is reproduced as Appendix C (App. C at 17a-18a). The judgment of the court of appeals issued as mandate on June 6, 1991 is reproduced as Appendix D (App. D at 19a-20a).

Jurisdiction

The judgment of the court of appeals denying the Petition for Rehearing and Suggestion of Rehearing In Banc was entered on May 20, 1991. This petition is being filed within 90 days after that date. Supreme Court Rule 13.4. The jurisdiction of this court is invoked under 28 U.S.C.A. 1254(1).

Statutes

The relevant statutes are as follows:

1. Section 302(c)(5)(B) of the Labor Management Relations Act, ("LMRA"), 29 U.S.C.A. Section 186(c)(5)(B):

> (c) The provisions of this section shall not be applicable (5) with respect to money or other things of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement;...
>
> ***

2. Sections 3(2)(A) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.A. 1002(2)(A):

Definitions

For purposes of this subchapter:

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

3. Section 3(37)(A) of ERISA, 29 U.S.C.A. 1002(37)(A):

(37)(A) The term "multiemployer plan" means a plan—

(i) to which more than one employer is required to contribute,

(ii) which is maintained pursuant to one or more collective bargaining agreements between

one or more employee organizations and more than one employer, and

(iii) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation.

***

4. Section 403(a) of ERISA, 29 U.S.C.A. Section 1103(a):

1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in Section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to Section 1102(c)(3) of this title.

5. Section 404(a)(1)(A) of ERISA, 29 U.S.C.A. Section 1104(a)(1)(A);

11.04. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

***

6. Section 4001(a)(3) of ERISA, 29 U.S.C.A. Section 1301(a)(3):

1301. Definitions

(a) For purposes of this subchapter, the term—

(3) ''multiemployer plan'' means a plan—

(A) to which more than one employer is required to contribute

(B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation,

***

Statement of the Case

The Petitioners, Plaintiffs in the District Court, who are the Union appointed trustees to the Board of Trustees of the Mobile Steamship Association-International Longshoremen's Association ("MSSA-ILA") Pension Plan and the Trust ("The Plan"), filed this action on June 9, 1989 in the United States District Court for the Southern District of Alabama against the Employer appointed trustees to the plan, after a request to increase pension benefits by three Union Trustees had failed on a tie vote with all Union Trustees voting in favor of the increase and all Employer Trustees voting against it. Pursuant to the terms of the plan and Section 302(c)(5)(B) of the Labor Management Relations Act ("LMRA"), 29 U.S.C.A. 186(c)(5)(B), the Union Trustees sought, inter alia, (1) a declaration from the district court that the requested increase in the amount of pension benefits was a matter subject to arbitration under the terms of the plan and, (2) an order declaring that a tie vote between the Union and Employer Trustees had occurred resulting in a deadlock within the meaning of the applicable plan provisions and Section 302(c)(5)(B) of the Labor Management Relations Act, ("LMRA"), 29 U.S.C.A. 186(c)(5)(B), respectively. The Union Trustees filed their Second Amended Complaint on May 4, 1990 seeking, in addition to the claims cited above, an order that Section 14.01 of the plan, requiring a seventy-five percent (75%) vote to amend the plan to change benefits, violates 29 U.S.C.A. 186(c)(5)(B).

Both sides filed motions for summary judgment. The district court entered its ruling in favor of the Union Trustees on June 8, 1990, holding that Section 11.06 of the plan required the trustees to submit the proposal to arbitration because the vote on the proposed pension increase had resulted in a tie. (App. B at 11a-16a).

The Employer Trustees appealed and the case was argued before a hearing panel of the Eleventh Circuit Court of Appeals, consisting of Circuit Judges Fay and Johnson and Senior Circuit Judge Peck on January 29, 1991. The panel issued its ruling on March 22, 1991 reversing the district court on the basis that (1) the plan required any change in benefits to be made by amendment and amendments require approval of seventy-five percent (75%) of the trustees which precludes arbitration under 29 U.S.C.A 186(c)(5)(B) because amendments do not involve administration of the plan; and (2) that Section 14.01 of the plan which requires approval of seventy-five percent (75%) of the trustees in order to amend the plan did not violate 29 U.S.C.A. 186(c)(5)(B). (App. A at 1a-10a).

The court of appeals denied the Union Trustees' Petition for Rehearing and Suggestion for Rehearing In Banc on May 20, 1991. (App. C at 17a-18a).

Several provisions of the plan relevant to the issues involved in this case are set out in pertinent part below:

> 1.1 *Purpose.* The purpose of this Pension Plan and Trust is to provide retirement benefits for Employees who are eligible therefor in accordance with the terms and conditions hereof.
>
> 6.01 *Normal Retirement Pension.* A Participant who has satisfied the requirements of Section 5.01 of Article Five hereof and who retires on or after October 1, 1979, with twenty (20) or more years of Credited Service shall receive a pension determined in accordance with the following schedule:

Average Number of Hours in Credited Service	*Monthly Pension*
700-999	$416.00
1,000-1,499	$453.00
1,500 or more	$490.00

***

6.05 *Change in Benefits.* The Trustees shall also have the right, whenever it finds that the financial situation of the Fund permits such action , to adjust the monthly pension benefits.

In the event that a change is made in the amount of monthly benefits, either upward or downward, pursuant to the provisions of this Article, such change shall be made through an amendment to this plan, which amendment prior to becoming effective, must be approved by the Department of Internal Revenue or such other governmental agency as may be required by applicable law.

11.04 *Powers.*

(a) Subject to the provisions of the Agreement, the Trustees jointly shall have full power and authority to administer the Trust Fund and the Pension Plan contained herein. The Trustees, in the administration of said plan, shall have no authority to commit either the Union or the Employer for amounts other than financial resources of the Trust Fund.

11.05 *Meetings of the Trustees.*

(a)...In the event any matter presented for decision cannot be decided because of a tie vote the matter shall remain in status quo pending its arbitration as set forth in Section 11.06 hereof.

(b) Except as otherwise provided herein, any action taken by the Trustees pursuant to this Trust Agreement shall be by a majority vote of the Trustees.

(c)...Individual Trustees may not take any action or on behalf of the Trustees between meetings except as may be specifically authorized by the Board of Trustees in writing.....

11.06 *Arbitration.*

In the event the Trustees cannot decide any matter or resolve any dispute because of a tie vote, the Trustees will by unanimous vote select such impartial arbitrator within ten (10) days of the tie vote to decide the issue. In the event such arbitrator is not selected within said ten day period, application shall be made to the Judge of the United States District Court for the Southern District of Alabama, Southern Division for the appointment of an arbitrator to settle the matter or resolve the dispute. Application to said court for the appointment of an arbitrator may be made by any two (2) or more members of the Board of Trustees.....

14.01 *Amendment.*

(a) This Pension Plan and Trust may be amended to any extent at any time or from time to time by the vote of seventy-five percent (75%) of all Trustees provided for at that time under this Trust Agreement;.....

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I.

The court of appeals erred and rendered a decision in conflict with other circuits by ruling that Section 302(c)(5)(B) of the Labor Management Relations Act ("LMRA"), 29 U.S.C.A. 186(c)(5)(B), did not require arbitration of a request to increase pension benefits even though the Trustees were deadlocked over the issue.

The court of appeals determined that an increase in benefits under the subject plan was not a matter of trust administration

but an extraordinary matter and, as such, was not controlled by 29 U.S.C.A. 186(c)(5)(B) which mandates that all ERISA pension plans contain clauses providing for arbitration if the trustees are deadlocked on a matter having to do with administration of the plan. *Jackson v. Smith,* 927 F.2d 544, 548 (11th Cir. 1991); *Alfarone v. Bernie Wolf Construction Corp.*, 788 F.2d 76, 79 (2d Cir. 1986). The Eleventh Circuit's holding on this point is in conflict with the holding of three other circuits in cases with substantially similar facts. See *Hauskins v. Stratton,* 721 F.2d 535 (5th Cir. 1983); *Hawkins v. Bennett,* 704 F.2d 1157 (9th Cir. 1983) and *Geigle V. Flacke,* 768 F.2d 259 (8th Cir. 1985).

The court of appeals sought to distinguish these cases by stating that the parties in the instant case "established during the course of collective bargaining the level of benefits as well as the procedure for changing those benefits and federal courts are barred from modifying those terms" under such circumstances. *Jackson v. Smith, supra,* at 549 citing *United Mine Workers of Am. Health & Retirement Funds v. Robinson ("UMW").* 455 U.S. 562, 576, 102 S.Ct. 1226, 1234, 71 L.Ed.2d 419 (1982). There is absolutely nothing in the record to support this conclusion. The trustees clearly have the right to set the level of benefits under Article Six (6) of the plan, *supra.* The parties only agreed through collective bargaining many years ago to establish the plan and the trustees, as required by law, administer it. The current benefit levels were set by the trustees not by the parties to the collective bargaining agreement as was the procedure for changing those benefit levels. Only the trustees of the plan, not the parties, are authorized to change those benefits under the plan.

The Fifth Circuit, in *Hauskins, supra,* considered and rejected the rationale used by the Eleventh Circuit.

> "We conclude that the benefits level in the case before us is a management and control function. The authority and discretion to manage and control the

> assets of the pension trust fund is vested exclusively in the trustees and not in the employers or unions. *NLRB v. Amax Coal Co.* 453 U.S. at 332, 333, 101 S.Ct. 2795-2796 (construing 29 U.S.C. Section 1103(a). We hold that the trustees had the power to consider a proposal to adjust the level of benefits to the Fund's beneficiaries. Since the trustees were deadlocked, a majority of the trustees were empowered to refer the issue to arbitration. The trustees acted properly in doing so. 721 F.2d at 537.

The Ninth Circuit in *Hawkins v. Bennett, supra,* responded to the issue similarly:

> "The union trustees contend that, aside from the question of whether the agreement can restrict the statutory language, the agreement in essence conforms to the statutory language, and the meaning of the statute and the agreement are identical. We agree. There was a deadlock which rendered it impossible for the trustees to act upon an important aspect of the administration of the fund, an increase in benefits. That is all the agreement and the statute purport to require to activate the mechanism for arbitration." 704 F.2d at 1160.

The court of appeals attempts to further distinguish *Hawkins, supra,* and *Hauskins, supra,* by stating that the plans at issue in those cases were silent on the question of whether an increase in benefits level was a matter of trust administration, implying that the plan in the instant case speaks on the subject. The plan here is also silent insofar as it does not specifically state that a change in benefits is a question of trust administration. It is doubtful that any plan contains such a specific categorization or that one is necessary under Section 186(c)(5)(B). Section 11.04 of the subject plan, in any event, clearly includes increasing benefits as a matter of trust administration and there is nothing in the record or the plan to suggest otherwise:

> 11.04 *Powers.*
>
> (a) Subject to the provisions of the Agreement, the Trustees jointly shall have full power and authority to administer the Trust Fund and the Pension Plan contained herein. The Trustees, in the administration of the said plan, shall have no authority to commit either the union or the Employer for amounts other than financial resources of the Trust Fund.

Also see Section 403(a) and 404(a)(1)(A) of ERISA, 29 U.S.C.A. 1103(a) and 1104 (a)(1)(A).

Finally, the Eleventh Circuit sought to distinguish its holding from *Geigle v. Flacke, supra,* in addition to a factual similarity with *Hawkins* and *Hauskins, supra,* the plan also required an amendment of the plan to change benefits to have more than a majority of the trustees just like the instant plan. The Eleventh Circuit stated the following:

> In *Geigle,* 768 F.2d at 262, increasing benefits were specifically listed under the section of the plan outlining the powers of the trustees. "Although the trustees had to amend the plan to increase benefits, the plan referred to any change or modification of the plan as an amendment. *id.* Moreover, unlike the case at bar, such amendments apparently required only a simple majority in order to be enacted. *id.* Finally, the Eighth Circuit noted that the trustees had routinely exercised their authority to amend the plan to increase benefits. The Eighth Circuit stated that under such circumstances a benefit increase is an administrative matter." 927 F.2d at 548.

Here, as in *Geigle, supra,* Section 11.04 of the plan outlining the powers of the trustees includes benefits; an amendment to increase benefits was required as with any change or modification of the plan and whether a simple majority or "super" majority is required for the amendment is hardly of much importance in determining whether a change in benefits

is a matter of plan administration since every change of the plan requires an amendment; and, the trustees have the power to change benefits and have done so in the past.

The Eleventh Circuit is mistaken in stating that amendments under the *Geigle* plan "apparently required only a simple majority" to become effective. (App. A at 6a). Amending the plan in *Geigle, supra,* not only required that the trustees *concur* in the amendment but also required that the unions representing the majority of the participants and the employers employing a majority of the participants to have notice of the proposed amendment and not object before an amendment could become effective. *id* at 261.[5] (Emphasis Supplied)

There is no real distinction between the subject plan and the *Geigle* plan and the Eleventh Circuit's holding is in conflict with the Eighth Circuit in this regard. That holding is also in conflict with the Second and Fifth Circuits, as discussed, and this is one of the reasons relied upon by the petitioners in asking this Court to allow the writ of certiorari.

---

[5]The precise plan language relating to amendments in the *Geigle* plan is as follows:

ARTICLE X

[of the Trust Agreement]

Amendments

10.1 *Method of Amendment.* This Agreement may be amended in writing at any time as follows: The Trustees, in accordance with the voting provisions of section 5.5, shall first concur in the amendment and thereafter submit same in writing to the Unions and the Employers. Within 30 days after date of mailing of said amendment any Employer or Union may present in writing to the Trustees his objection thereto. If Unions representing a majority of Participants or if Employers employing a majority of the Participants present such objection, then the amendment shall not become effective. If, however, within the aforesaid time neither the Unions representing a majority of Participants nor Employers employing a majority of the Participants present such objection, then the amendment shall become effective as of the effective date set forth in the amendments.

II.

The court of appeals erred and rendered a decision in conflict with other circuits by holding that a provision in the subject plan requiring approval of seventy-five percent (75%) of all trustees did not violate Section 302(c)(5)(B) of the Labor Management Relations Act ("LMRA"), 29 U.S.C.A. (302)(c)(5)(B).

Section 302(c)(5)(B), 29 U.S.C.A. Section 186(c)(5)(B) requires, without exception, that all ERISA pension plans contain provisions for arbitration in the event the employer and employee trustees deadlock on the administration of the fund. It also requires that the two groups have equal representation in such administration. "These trust provisions are mandated by the Labor Management Relations Act ("LMRA") as a condition of the existence of all union pension and benefit funds. 29 U.S.C.A 186(c)(5)(B)." *Alfarone v. Bernie Wolf Construction Corp., supra,* 788 F.2d 76. "This even division between the number of Trustees by the union and by management presumably serves to protect the interests of both parties to the collective bargaining agreement". *Hauskins v. Stratton,* 516 F.Supp. 1028, 29 (W.D.L.A. 1983). Congress in enacting 29 U.S.C.A. 186(c)(5)(B) recognized that this even administration equal representation could sometimes result in split voting, tie votes or deadlocks on issues arising under the plan. Hence, a mechanism to resolve the tie votes or deadlocks was established in the plan and the statute, *Hauskins v. Stratton, supra.*

Congress clearly intended to include all pension plans within the ambit of the statute and did not intend for it to be circumvented by a seventy-five percent (75%) approval requirement for amendments. Only the Eleventh Circuit's ruling here causes the subject plan to be different, a ruling which as we have noted, conflicts with the application of the statute to similar factual situations by all other circuits that have confronted it. See *Hauskins, Hawkins* and *Geigle, supra.*

Faced with the choice of finding that the seventy-five percent (75%) affirmative vote requirement of Section 14.01 of the subject plan violates 29 U.S.C.A. 186(c)(5)(B) or upholding the plan provision, the court of appeals chose to uphold the provision. It did so on the basis that pension increases under the plan are extraordinary matters simply because they require amendment of the plan by approval of seventy-five percent (75%) of the trustees and are not matters of trust administration such as would invoke the arbitration requirement of Section 186(c)(5)(B).

The only case that the court of appeals cites in support of this view is *Ader v. Hughes*, 570 F.2d 303 (10th Cir. 1978). The facts in *Ader, supra*, are radically different from the facts at bar and no court has followed that case, directly or indirectly, in cases factually similar to the instant case except the Eleventh Circuit and it only does so by implication.

But for the seventy-five percent (75%) approval requirement for amendments, the subject plan complies with the statute by providing a mechanism for resolving deadlocks or tie votes. Section 11.01 provides that,

> *"In the event the Trustees cannot decide any matter or resolve any dispute because of a tie vote.....* then.....a majority of the Trustees may submit the matter to an impartial arbitrator for hearing and determination of the matter, issue or dispute...." (Emphasis Supplied)

The Trustees did this in the case at bar although the management trustees later "withdrew" their consent to arbitrate on the basis of the seventy-five percent (75%) requirement of Section 14.01 of the plan (App. A at 2a). If the Eleventh Circuit had declared Section 14.01 to be in violation of 29 U.S.C.A. 186(c)(5)(B) the plan clearly would have been in compliance. Instead of resolving the apparent conflict between Sections 11.01 or 14.01 of the plan in a manner that would

have been consistent with the statute and other circuits, the Eleventh Circuit chose a route that conflicts with both. The court, in doing so, has created a situation where nothing under the plan is subject to arbitration when the trustees deadlock because the plan controls everything from the time and place of meeting (Section 11.05) to the eligibility of participants (Sections 5.01-5.04). To change anything under the plan would require an amendment with 75% trustee approval and under the Eleventh Circuit's rationale would not be a matter of plan administration and, therefore, not subject to arbitration.

Finally, the court of appeals bases its opinion, in part, on the law that "pension fund trustees have no authority to resolve issues that are properly the subject of collective bargaining." See *Jackson v. Smith* at page 548, citing *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336-37, 101 S.Ct. 2789, 2797-98. This is true but has no application to pension increases under ERISA plans such as the subject plan. The trustees have the sole and exclusive power under Section 11.04, *supra*. Their power with respect to the assets of the plan are consistent with the direction of Section 32(a) of ERISA, 29 U.S.C.A. 1103(a), which provides, in pertinent part, that "the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan....." Changing benefits, thus, becomes management and control function vested exclusively in the trustees and not in the employers or unions. See *Hawkins v. Bennett, supra,* citing *NLRB v. Amax Coal Co., supra,* construing ERISA Section 32(a), 29 U.S.C.A. 1103(a), *supra.*

The decision of the court of appeals in this regard not only improperly restricts the application of 29 U.S.C.A. Section 186(c)(5)(B) but also limits the powers expressly granted to the trustees under ERISA thereby causing the plan to be in violation of the law. This view is in conflict with the position of other circuits on this issue and provides additional reason upon which the petitioners rely for allowing the writ of certiorari.

Conclusion

Petitioners submit and rely upon the foregoing reasons for the allowance of the writ of certiorari pursuant to Supreme Court Rule 10.1.

Dated: August 15, 1991
Mobile, Alabama

Respectfully submitted,

BY: _____

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(205) 456-9922

APPENDIX

Oscar W. JACKSON, Clayborne Taite, Jr., George Bru, Albert Walton, as Trustees of MSSA-ILA Pension Plan and Trust, Plaintiffs-Appellees Cross-Appellants,

v.

Harry SMITH, Defendant,

Arthur W. Stratton, Hartwell Ludlow, Ned Mattingly, as Employer Trustees of MSSA-ILA Pension Plan, Defendants-Appellants Cross-Appellees.

No. 90-7504.

United States Court of Appeals,
Eleventh Circuit.
March 22, 1991.

Appeals from the United States District Court for the Southern District of Alabama.

Before FAY and JOHNSON, Circuit Judges, and PECK*, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This case arises on appeal from the district court's grant of summary judgment holding that a tie vote among trustees over whether to increase benefits paid by a pension plan (''the Plan'') is subject to arbitration.

I. Statement of the Case

A. *Background Facts*

The Plan is an ''employee pension benefit plan'' within the meaning of Section 3(2)(A) of the Employment Retirement Income Security Act of 1974 (''ERISA''), 29 U.S.C. §

*Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

1002(2)(A), and a "multiemployer plan" within the meaning of ERISA §§ 3(37)(A) & 4001(a)(3), 29 U.S.C. §§ 1002(37)(A) & 1301(a)(3). The Plan was established pursuant to collective-bargaining agreements between the employers, who are represented by the Mobile Steamship Association ("MSSA"), and Locals 1410, 1410-1, and 1459 of the International Longshoreman's Association ("ILA"). A Board of Trustees, consisting of four trustees named by the union locals and four trustees named by MSSA administers the trust fund created by the Plan.

This suit originated in a dispute over whether the Plan's benefits should be increased. The current level of benefits is set out in the Plan at Article Six, Section 6.01. During a Board meeting on February 23, 1989, Union Trustee Seymour Irby, Jr., proposed that pension benefits be increased by ten percent across-the-board. All Union Trustees voted in favor of the proposal, but all Employer Trustees voted against it. Following the vote, Mr. Irby requested that the increase be submitted to arbitration. The Board unanimously agreed to arbitration.[1]

On April 3, 1989, the Board submitted the increase question to the American Arbitration Association ("AAA"). On May 3, 1989, the Employer Trustees withdrew their consent to arbitration by the AAA, claiming that the increase issue was not an arbitrable matter under the Plan. The Employer Trustees noted that Section 6.05 expressly declares that any change in benefits, upward or downward, "shall be made through an amendment to this Plan" and that Section 14.01 states that the Plan may be amended "by the vote of seventy-five percent (75%) of all Trustees." The Employer Trustees therefore asserted that the proposal for an increase failed because it did not receive the requisite seventy-five percent vote, not because the vote resulted in a tie. The Union Trustees disagreed and initiated this litigation in the district court. The AAA responded by stating that it would hold the arbitration proceeding in

[1]Section 11.06 of the Plan provides for arbitration if the "Trustees cannot decide any matter or resolve any dispute because of a tie vote."

abeyance pending the outcome of this action. On May 25, 1989, the Board considered a second proposal to grant a ten percent increase in benefits. Once again, the vote resulted in all of the Union Trustees voting in favor of the increase and all of the Employer Trustees voting against it.

B. *Procedural History*

On June 9, 1989, the Union Trustees filed the instant action against the Employer Trustees. The Union Trustees sought, among other things, an order declaring (1) that the benefit increase proposal was subject to arbitration, (2) that the action of the Employer Trustees in withdrawing their consent to arbitration violated the terms of the Plan,[2] and (3) that, because Section 14.01 requires a seventy-five percent affirmative vote to amend the Plan and Section 6.05 requires an amendment in order to increase benefits, any vote of less than seventy-five percent created a deadlock within the meaning of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5)(B), thereby requiring arbitration. The Employer Trustees filed their answer on July 5, 1989.

On September 9, 1989, the Union Trustees filed their First Amended Complaint which, in addition to those claims asserted, in the initial complaint, sought an order declaring that Sections 11.05 and 11.06 mandated arbitration because a tie vote had occurred on the proposed benefit increase. On April 16, 1990, the Union Trustees filed their motion for summary judgment. On May 4, 1990, the Union Trustees filed their Second Amended Complaint seeking, in addition to the claims already asserted, an order declaring (1) that the Employer Trustees had breached their fiduciary duty under Section 11.05 of the Plan and 29 U.S.C. § 186(c)(5)(B) by refusing to submit the proposed

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[2]In the alternative, the Union Trustees sought an order declaring that, even if the Employer Trustees could withdraw their consent, Section 11.06 required the appointment of an arbitrator.

increase to arbitration, and (2) that Section 14.01 of the Plan, requiring a seventy-five percent vote to amend the plan to increase benefits, violates the provisions of 29 U.S.C. § 186(c)(5)(B) which require that a pension plan be evenly administered by an equal number of labor and management trustees.

The Employer Trustees filed their motion for summary judgment on May 11, 1990. The district court entered its ruling on June 8, 1990, holding that Section 11.06 required the Trustees to submit the proposal to arbitration because the vote on the proposed pension increase resulted in a tie. Despite denying the Union Trustees leave to file the Second Amended Complaint, the court also held that the Employer Trustees had not violated any fiduciary duty by withdrawing their consent to arbitration.[3] The Employer Trustees appealed, and the Union Trustees cross-appealed. The district court denied the Employer Trustees' motion to stay enforcement of judgment pending appeal and ordered the pension increase to proceed to arbitration. The court ordered, however, that, if the arbitrator awarded an increase, no increase had to be paid until [the] appeal was heard. But the court also ordered that, if affirmed, interest on any increase must be paid retroactively to the effective date of the increase.

In this appeal, we first consider whether the pension increase is an arbitrable matter. We also determine whether the Employer Trustees violated their fiduciary duty by withdrawing their consent to arbitration unilaterally and whether the district court erred by denying the Union Trustees leave to file the Second Amended Complaint.

II. Analysis

This Court reviews *de novo* a district court's order granting a motion for summary judgment. *Ordway v. United States*, 908

[3]The Union Trustees asserted this claim only in the Second Amended Complaint.

F.2d 890, 893 (11th Cir.1990). This Court must determine whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). All evidence and reasonable factual inferences therefrom are reviewed in the light most favorable to the party opposing the motion. *Hinesville Bank v. Pony Express Courier Corp.*, 868 F.2d 1532, 1535 (11th Cir.1989).

A. *Arbitration*

[1] The Union Trustees argue that because the proposal for an increase resulted in a tie vote it is subject to arbitration. As authority for their position, they cite to Section 11.06 of the Plan which expressly states that if "the Trustees cannot decide any matter or resolve any dispute because of a tie vote" that issue is subject to arbitration. The Union Trustees also point to 29 U.S.C. § 186(c)(5)(B) which provides that if the trustees are deadlocked over an issue pertaining to the administration of a plan they must submit that issue to arbitration. Citing holdings by three Circuits that benefit increases fall within the administration of a plan, they argue that Section 186(c)(5)(B) requires that the Employer Trustees submit the disputed benefit increase proposal to arbitration. *See Geigle v. Flacke*, 768 F.2d 259, 262 (8th Cir.1985); *Hauskins v. Stratton*, 721 F.2d 535, 537 (5th Cir.1983); *Hawkins v. Bennett*, 704 F.2d 1157, 1162 (9th Cir.1983).

The Employer Trustees argue that Section 6.05 of the Plan specifically states that any change in benefits, upward or downward, "shall be made [through] an amendment" to the Plan. They point out that Section 14.01 declares that an amendment requires approval by seventy-five percent of the Trustees. They claim that, by requiring a change in benefits to be accomplished only through an amendment requiring seventy-five percent approval, the parties to the collective-bargaining agreement that produced the Plan intended for a change in benefits to be treated as an "extraordinary" matter outside the arbitration provisions of the plan and the LMRA. *See Ader v. Hughes*, 570 F.2d 303, 307 (10th Cir. 1978) (holding that the amendment of a plan was

not administrative and therefore did not fall within the arbitration provision of 29 U.S.C. § 186(c)(5)(B)). Moreover, they contend that the proposed benefits increase did not pass because of a tie vote. Rather, it did not pass because it failed to receive seventy-five percent approval. Accordingly, they argue that the tie-vote arbitration provision does not apply to the proposal for increasing benefits. The Employer Trustees support this argument by noting that had the vote been 5-3 the proposal would still have failed and yet the arbitration provision would not have been triggered because there was no tie vote.

To resolve this dispute, this Court must determine whether an increase in benefits is an administrative matter or an extraordinary matter. The cases cited by the Union Trustees are distinguishable from the instant case. In *Hawkins*, 704 F.2d at 1159-60, the plan at issue was entirely silent on the level of benefits to provide employees or the procedure to follow to change the level of benefits. Given this factual situation, the Ninth Circuit determined that a benefit increase fell within the category of trust administration and ordered arbitration pursuant to Section 186(c)(5)(B). In *Hauskins*, 721 F.2d at 537, the plan was also silent on whether benefit changes were a matter of trust administration. The Fifth Circuit, citing *Hawkins, supra*, held that benefit changes were an administrative matter subject to arbitration. *Id.* In *Geigle*, 768 F.2d at 262, increasing benefits was specifically listed under the section of the plan outlining the powers of the trustees. Although the trustees had to amend the plan to increase benefits, the plan referred to any change or modification of the plan as an amendment. *Id.* Moreover, unlike the case at bar, such amendment, apparently, required only a simple majority in order to be enacted. Finally, the Eighth Circuit noted that the trustees had routinely exercised their authority to amend the plan to increase benefits. The Eighth Circuit stated that under such circumstances a benefit increase is an administrative matter.

By contrast, Section 6.01 of the Plan at issue in this litigation establishes a fixed schedule of benefits. Moreover, Section 6.05 expressly outlines the procedure for changing the level of

benefits, stating that a change, either upward or downward, "shall be made through an amendment to this Plan." Finally, Section 14.01 of the Plan states that an amendment to the Plan requires approval of seventy-five percent of the Trustees.

Pension fund trustees have no authority to resolve issues that are properly the subject of collective bargaining. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 336-37, 101 S.Ct. 2789, 2797-98, 69 L.Ed.2d 672 (1981); *Hauskins*, 721 F.2d at 537. Moreover, "when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." *United Mine Workers of Am. Health & Retirement Funds v. Robinson ("UMW")*, 455 U.S. 562, 576, 102 S.Ct. 1226, 1234, 71 L.Ed.2d 419 (1982).

This Plan is the product of a series of collective-bargaining agreements between the MSSA and the Locals 1410, 1410-1 and 1459 of the ILA. The express language of the Plan supports the Employer Trustees' argument that the parties to the collective-bargaining contract decided to treat changes in benefits as a special matter. First, the Plan specifically sets forth the level of benefits to be paid to each beneficiary. Moreover, the Plan expressly characterizes changes in benefits as amendments and requires that such amendments be approved by seventy-five percent of the Trustees before taking effect. Although Congress mandated that all ERISA plans be drafted in accord with certain requirements,[4] it did not state that changes in benefits fall under the administrative powers of the trustees. This Court can find nothing in the language or legislative history of Section 186(c)(5)(B) that leads to the conclusion that benefit increases automatically fall under the administration of a plan. *See* H.Rep. No. 510, 80th Cong., 1st Sess., *reprinted in* 1947 U.S.Code Cong. Serv. 1135, 1171. It may be that, in the absence of plan language to the contrary, changes in benefits

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[4]Congress required all ERISA plans to contain clauses providing for arbitration if the trustees deadlocked on a matter having to do with the administration of the plan, 29 U.S.C. § 186(c)(5)(B), and for a procedure to amend the plan, 29 U.S.C. § 1102(b)(3).

should ordinarily be treated as an administrative matter. *See Hawkins, supra.* Where, as in the present case, the parties have established during the course of collective bargaining the level of benefits as well as the procedure for changing those benefits, federal courts are barred from modifying those terms. *See UMW,* 455 U.S. at 576, 102 S.Ct. at 1234.

[2] The Union Trustees also argue that the seventy-five percent approval provision to amend the Plan violates the requirement of Section 186(c)(5)(B) that plans shall be administered by an equal number of labor and employer representatives. The Union Trustees contend that if a benefit increase is conditioned on seventy-five percent approval then Employer Trustees will have an absolute veto over this issue, thereby giving the Employer Trustees more power than the Union Trustees.

The flaw in this argument is evident. The seventy-five percent approval requirement applies to *changes* in benefits, either upward or downward. While the Employer Trustees retain an absolute veto over increases in benefits, the Union Trustees retain an absolute veto over decreases in benefits. The parties stand in equal positions; neither can change benefits without the assistance of the other. Accordingly, we find the Union Trustees' argument that 29 U.S.C. § 186(c)(5)(B) invalidates Section 14.01 of the Plan to be meritless.

[3] The Union Trustees also argue that the Trustees have violated their fiduciary duty to administer the Plan "solely in the interest of the participants and beneficiaries," 29 U.S.C. 1104(a)(1)(A), because Plan beneficiaries have received no increases for the past thirteen years. They argue that the evidence shows that the current contribution rate to the Plan would easily support the proposed increase. If, by their refusal to increase benefits, the Employer Trustees have violated their fiduciary duty to manage the trust in the interest of the beneficiaries, the Union Trustees or the beneficiaries who have been allegedly wronged should bring a cause of action directly under 29 U.S.C. § 1104(a)(1)(A). Provided the substantive terms of a plan produced through the collective-bargaining

process do not violate federal law, we have no authority to modify such terms. *UMW*, 455 U.S. at 576, 102 S.Ct. at 1234.

[4] The Union Trustees' final argument is that the plain language of Section 11.06 applies to the facts of this case. Section 11.06 requires that if the Trustees cannot resolve any issue or dispute because of a tie vote then the issue should be submitted to arbitration. The Union Trustees argue that a tie vote occurred here and therefore the increase question should be submitted to arbitration. The weakness of this argument is that it reads each section of the Plan in isolation and makes no attempt to give meaning and effect to every section. *See Arizona Laborers, Teamsters and Cement Masons Local 395 Health and Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1518 (9th Cir.1985). Section 6.05 expressly states that changes in benefits require amendments and Section 14.01 requires amendments to obtain seventy-five percent approval. Moreover, the arbitration provision, Section 11.06, is contained within Article 11 which describes the powers and operations of the Trustees. Section 11.04 states that the Trustees have the full authority "to administer the Trust Fund." As discussed, *supra*, in drafting the Plan the parties intended changes in benefits to be an extraordinary matter, requiring an amendment to the Plan, rather than an administrative matter. Accordingly, the arbitration provision does not apply. For these reasons, the district court erred in ruling that the proposed benefit increase was subject to arbitration.[5]

B. *Employer Trustees' Fiduciary Duty*

[5] Section 11.05(c) of the Plan states that individual trustees may not take any action for or on behalf of the trustees between meetings except as authorized by the Board. The Union Trustees cite this section to argue that the district court erred when it found that the Employer Trustees did not violate their fiduciary duty by unilaterally withdrawing their consent to arbitration. The district court held that the Employer Trustees were entitled

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[5]Because we hold that the proposed benefit increase is not an arbitrable matter, we need not reach the district court's ruling on the award of prejudgment interest.

to have the question of whether an increase in benefits was an arbitrable issue determined by the federal court.

The Supreme Court has held that "[u]nless the parties clearly and unmistakably provide otherwise, the question whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT & T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986). Accordingly, the district court properly concluded that the Employer Trustees did not violate their fiduciary duty by withdrawing their consent to arbitration.

C. *The Second Amended Complaint*

The Union Trustees also argue that the district court erred in refusing to permit them leave to file a Second Amended Complaint. The Union Trustees claim that they moved for leave to file the Second Amended Complaint after their motion for summary judgment in order to conform the issues more clearly with the evidence pursuant to Fed.R.Civ.P. 15(b). The Second Amended Complaint asserted three claims in addition to the claims asserted in the First Amended Complaint. These included two claims for breach of fiduciary duty and one claim seeking a finding that Section 14.01 of the Plan, which required seventy-five percent approval for amendments, violated the arbitration requirement of Section 186(c)(5)(B).

Because we find no merits to these claims, *See* II(A) & II(B) *supra*, we decline to order the district court to grant the Union Trustees leave to file the Second Amended Complaint.

III. Conclusion

For the foregoing reasons, we REVERSE the summary judgment of the district court that a change in benefits is an arbitrable issue under the plan. We AFFIRM, however, the district court's holding that the Employer Trustees did not breach their fiduciary duty by withdrawing their consent to arbitration.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SEYMOUR IRBY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION NO.
	)	89-0438-T
HARRY SMITH, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law entered on this date, it is ORDERED, ADJUDGED, and DECREED, that the dispute between the trustees in this action concerning a requested increase in pension benefits, specifically "for an across-the-board increase of ten percent to all persons receiving pension benefits from the MSSA-ILA Pension Plan" shall be submitted to the American Arbitration Association (AAA) for arbitration within ten (10) days of the date of this Judgment. Costs in this action are to be taxed to the defendants, Harry Smith, et al. This court will retain jurisdiction of this action in order to confirm compliance with this Judgment. The clerk is directed to remove this case from the active docket pending further orders of the Court.

DONE this 8th day of June, 1990.

/s/ Daniel H. Thomas
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SEYMOUR IRBY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION NO.
	)	89-0438-T
HARRY SMITH, et al.,	)	
	)	
Defendants.	)	

ORDER

This cause is before this Court pursuant to the plaintiffs Second Amended Application for the Appointment of an Arbitrator and Complaint for Declaratory and Injunctive Relief, and the defendants objection thereto, the plaintiffs Motion for Consolidation, and the defendants objection thereto, the plaintiffs Motion for Summary Judgment, and the defendants objection thereto, and the defendants Motion for Summary Judgment. This Court has reviewed all pertinent materials in the file, and hereby concludes that the plaintiffs Second Amended Application for the Appointment of an Arbitrator and Complaint for Declaratory and Injunctive Relief is due to be, and hereby is, DENIED. The plaintiffs Motion for Consolidation is denied. The plaintiffs motion for summary judgment is GRANTED in part, and DENIED, in part. The defendants motion for summary judgment is DENIED.

FINDINGS OF FACT

1. Plaintiffs filed this action on June 9, 1989, in the United States District Court for the Southern District of Alabama, Southern Division.

2. Plaintiffs, Oscar Jackson, Clayborne Taite, Jr., George Bru and Albert Walton, are the union appointed Trustees to the Board of Trustees of the Mobile Steamship Association-International Longshoreman's Association Pension Plan and Trust, (''The Plan'') a labor-management trust fund, within the

meaning of the Labor-Management Relations Act, 29 U.S.C. Section 186(c)(5), with its offices located in Mobile, Alabama. Former Union Trustees, Henry Clark, Seymour Irby, Jr. and Anthony Costell, were the original plaintiffs but were replaced by Mr. Jackson, Mr. Taite and Mr. Bru, on a motion for leave to substitute party plaintiffs.

3. The plan is a multi-employer employee benefit pension plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 1001, et seq., created and maintained in accordance with collective bargaining agreements between the Mobile Steamship Association, Inc. ("MSSA") and certain local unions of the International Longshoreman's Association, covering the port of Mobile, Alabama for the purpose of collecting and receiving contributions and providing pension benefits to eligible participants.

4. Defendants, Harry Smith, Arthur Stratton, Hartwell Ludlow and Ned Mattingly, are the employer appointed Trustees to the Board of Trustees of the Plan.

5. On or about February 23, 1989, during a meeting of the Board of Trustees of the Plan, a motion was made by Mr. Seymour Irby, Jr., a union appointed trustee, "for an across-the-board increase of ten percent to all persons receiving pension benefits from the MSSA-ILA Pension Plan," (hereinafter referred to as the "Requested Pension Increase"). This motion was seconded by Mr. Henry Clark. A roll call vote on the Requested Pension Increase resulted in all of the union appointed trustees voting in favor of the motion, and all of the employer appointed trustees voting against the motion, resulting in a tie vote which was so declared by the chairman.

6. Following the vote on the Requested Pension Increase, Mr. Irby, on behalf of the union-appointed trustees, requested that the issue of the Requested Pension Increase be submitted to arbitration. The trustees agreed to the "use of the [AAA] (American Arbitration Association, hereinafter referred to as the AAA) procedure for arbitration of the dispute." The trustees, by a submission agreement dated April 3, 1989, submitted the issue of a pension increase to arbitration. On or about May 3, 1989, the employer-appointed trustees by letter to the AAA withdrew their consent to utilize the AAA. The employer trustees withdrew their submission because, after

further consideration, the employer trustees believed the issue of the Requested Pension Increase was not arbitrable.

7. On or about May 26, 1989, the union-appointed trustees, through their attorney, notified the AAA that they did not agree with the employer-appointed trustees' position that the issue was not arbitrable.

8. On June 9, 1989, the union-appointed trustees filed this action seeking to have the Court declare the issue of the Requested Pension Increase to be arbitrable, and to have this Court appoint an impartial arbitrator to decide the issue.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to 29 U.S.C. § 186, and 28 U.S.C. § 1331, and under the Employee Retirement Income Security Act of 1974 (''ERISA''), 29 U.S.C. § 1001, et seq.

2. This action involves a dispute between the employer trustees, and the employee trustees, of the MSSA-ILA Pension Plan and Trust (''the Plan''). The plaintiffs are the Trustees appointed by the various local unions whose members participate in the Plan. The defendants are the Trustees appointed by the employer members of the Mobile Steamship Association. The dispute between the Trustees concerns the level of benefits to be paid by the Plan.

3. The plaintiff union appointed trustees (hereinafter the ''plaintiffs'') seek to have this Court appoint an impartial arbitrator to decide the issue of the Requested Pension Increase. The plaintiffs further seek to have this Court find that the employer-appointed trustees (hereinafter the ''defendants''), due to their refusal to arbitrate the Requested Pension Increase, have violated the terms of the plan and the law.

REFUSAL TO ARBITRATE

4. The United States Supreme Court has long held that the question of whether or not a particular issue is arbitrable is to be decided by the Court and not the arbitrator. The Supreme Court has also noted that, since the question of whether a particular issue is arbitrable is for the courts, ''compulsory submission to arbitration'' should not precede judicial

determination that the particular issue is arbitrable.

5. The defendants hold the good faith belief that this issue is not arbitrable. The defendants are entitled to have a determination by this Court that the issue involved is one that is arbitrable before being compelled to arbitrate the issue. The Court concludes that the defendants have not violated the plan or the law, nor have they breached their fiduciary duty, by insisting that the issue of arbitration be decided in the proper forum. The portion of the plaintiffs Motion for Summary Judgment which seeks to have this Court find that the employer-appointed trustees, (due to their refusal to arbitrate the Requested Pension Increase,) violated the terms of the Plan and the law, is hereby, DENIED.

APPOINTMENT OF AN IMPARTIAL ARBITRATOR

6. The Plan, as it is required to do under the Labor Management Relations Act, Section 302(c)(5), 29 U.S.C. § 186(c)(5), provides for the arbitration of disputes. The statute requires a plan to provide for arbitration "in the event the employer and employee groups deadlock on the administration of such fund..." In this action the employer and employee groups are "deadlocked" over whether to change benefits, and the power to change benefits is a matter of trust administration.

7. The situation in which the trustees must arbitrate a particular dispute under the Plan is where "any dispute" cannot be resolved "because of a tie vote." With respect to a tie vote, Article Eleven, § 11.05(a), of the Plan provides in pertinent part as follows:

> **"In the event any matter presented for decision cannot be decided because of a tie vote, that matter shall remain in status quo pending its arbitration as set forth in Section 11.06 hereof."**

8. Article Eleven, Section 11.06 provides in pertinent part, with respect to arbitration as follows:

> **11.06** ***Arbitration.*** **"In the event the trustees cannot decide any matter or resolve any dispute because of a tie vote, the trustees will**

by unanimous vote select such impartial arbitrator within ten (10) days of the tie vote to decide the issue. In the event such arbitrator is not selected within said ten day period application shall be made to the Judge of the United States District Court for the Southern District of Alabama, Southern Division for the appointment of an arbitrator to settle the matter or resolve the dispute. Application to said court for the appointment of an arbitrator may be made by any two (2) or more members of the Board of Trustees."

9. When all of the union trustees voted in favor of a motion to increase benefits and all of the employer trustees voted against it, a tie vote occurred on a matter of trust administration and the mechanism for arbitration set out in § 11.06 of the plan was activated. All that is required to activate the mechanism for arbitration under the Plan and the statute is a "deadlock" rendering it impossible for the trustees to act upon an important aspect of the administration of the fund. In this action the tie vote created a "deadlock" rendering it impossible for the trustees to act upon an important aspect of the administration of the fund, i.e. an increase in benefits. This Court concludes and hereby orders that the issue of the Requested Pension Increase is an arbitrable matter. Accordingly, this Court concludes and hereby orders, that the issue of the Requested Pension Increase, shall be submitted to the American Arbitration Association (AAA) for arbitration within ten (10) days of the date of this order. Judgment will be entered by a separate document. Costs to be taxed to defendants.

DONE this 8th of June, 1990.

/s/ Daniel H. Thomas

SENIOR UNITED STATES DISTRICT JUDGE

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7504

OSCAR W. JACKSON,
CLAYBORNE TAITE, JR.,
GEORGE BRU, ALBERT
WALTON, as Trustees of
MSSA-ILA Pension Plan
and Trust,

Plaintiffs-Appellees
Cross-Appellants,

versus

HARRY SMITH,

Defendant,

ARTHUR W. STRATTON,
HARTWELL LUDLOW,
NED MATTINGLY, as
Employer Trustees of
MSSA-ILA Pension Plan,

Defendants-Appellants
Cross-Appellees.

On Appeal from the United States District Court for the
Southern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion March 22, 1991, 11th Cir., 1991, 927 F.2d 544).

Before: FAY and JOHNSON, Circuit Judges, and PECK*, Senior Circuit Judge.
PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____ ORD-42
UNITED STATES CIRCUIT JUDGE (9/90)

*Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7504

D.C. Docket No. CA 89-0438-T

OSCAR W. JACKSON,
CLAYBORNE TAITE, JR.,
GEORGE BRU, ALBERT
WALTON, as Trustees of
MSSA-ILA Pension Plan
and Trust,

Plaintiffs-Appellees
Cross-Appellants,

versus

HARRY SMITH,

Defendant,

ARTHUR W. STRATTON,
HARTWELL LUDLOW,
NED MATTINGLY, as
Employer Trustees of
MSSA-ILA Pension Plan,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Alabama

Before FAY and JOHNSON, Circuit Judges, and PECK*, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of the said District Court in these causes be and the same are hereby AFFIRMED in part and REVERSED in part;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

*Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Entered: March 22, 1991
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: June 6, 1991